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Case No. 85-1529

In the Supreme Court of the United States

OCTOBER TERM, 1985

GRUMMAN AEROSPACE CORPORATION,
Petitioner,

vs.

EDWIN LEES SHAW, as Personal Representative of the Estate of Gary Scott Shaw, Deceased,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Because the Eleventh Circuit's opinion very carefully explains that the flight control system in issue here was designed exclusively by the defendant/petitioner and that no knowing and purposeful decision by the military was "second-guessed" by the trial court in finding the design defective and its designers negligent, we do not believe that the first two questions presented for review are implicated in this case. We also believe that the first two questions presented for review are highly argumentative. In our judgment, the remaining questions (as well as all subsidiary questions which might ultimately be relevant to a disposition of the case by this Court) can be fairly reduced to the following questions:

1. Does either the *"Feres-Stencel* doctrine" or the "separation of powers doctrine" provide a private independent contractor with an absolute defense to liability in a Congressionally authorized tort action for wrongful death caused by a defective product which the contractor has negligently designed and sold to the military?

2. If so, (a) what are the elements of the defense, and (b) did the defendant prove the elements of the defense as a matter of law below?

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Edwin Lees Shaw, as personal representative of the Estate of Gary Scott Shaw, deceased, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eleventh Circuit's opinion in this case.

STATEMENT OF THE CASE

The petitioner and its amici have largely ignored the factual findings made by the district court and approved by the Eleventh Circuit in this case. As a result, the

factual foundation upon which their arguments have been constructed is idealized and largely hypothetical. Although we recognize that the actual facts are more important to an ultimate disposition on the merits than to the threshold question of whether review should be granted, we would prefer that the Court make the latter determination on the facts which exist. We therefore refer the Court to the district court's findings of fact, which we will briefly highlight and embellish here.

Both Grumman and its amici would have it appear that the United States government is the real defendant here, and that the district court's judgment somehow questions the Navy's authority and invades the "separation of powers doctrine" as a result. The tactic is clever (perhaps even necessary to provoke a grant of review—since, without it, this would simply be an ordinary products liability case), but its deception should be transparent. Neither the United States nor the Navy are on trial in this case. The defendant is Grumman Aerospace Corporation, a private corporation in the business of designing, manufacturing, and selling civilian and military aircraft for profit (T. 2:134-35). Neither is there any basis for Grumman's insistence that anything short of absolute immunity from tort liability will require that the military be haled into court to account for its decisionmaking in the procurement process. No military personnel were called into court in this case; Grumman provided all the proof it thought necessary to sustain its so-called "military contractor defense" solely through the testimony of its own engineers.

Neither will the United States suffer any adverse financial impact from the judgment entered in this case. In fact, part of the contract price for the A-6 aircraft in issue here included the cost of liability insurance to cover

the accident in suit; indeed, the cost-plus-incentive-fee contract between the Government and Grumman *required* Grumman to purchase liability insurance coverage to cover the particular judgment in issue here (Defendant's Exhibit 5, Part 2, ¶16 of General Provisions (Cost-Reimbursement Type Research and Development Contracts), NavExos 3302(1-60)). In short, Grumman has already been paid by the Government to purchase liability insurance coverage for the benefit of the plaintiff in this suit. The record reflects that the required insurance coverage was purchased, and the only beneficiaries of a reversal in this case will therefore be windfall beneficiaries—insurers who have accepted substantial premiums to underwrite the very risk at issue here.

Next, in their pervasive effort to shade the facts to reinforce their arguments, Grumman and its amici have suggested (despite a finding of fact to the contrary, ¶39) that the design of the A-6's longitudinal flight control system was a joint effort by the Navy and Grumman. That is not what the record reflects. The record reflects that, after the Navy named Grumman as winner of a preliminary competition, Grumman proposed a "Detailed Specification" which was accepted by the Navy, and ultimately incorporated by reference into the contract finally entered into for production of the aircraft (T. 2:170; 3:4-7; Plaintiff's Exhibit 6). An examination of this "Detailed Specification" will reveal that its title is a misnomer—because it is very general in its terms, and it contains no detail whatsoever concerning the flight control systems yet to be designed pursuant to the specification and the contract (Plaintiff's Exhibit 6). The contract itself provides that responsibility for design rests with Grumman, not with the Navy (Defendant's Exhibit 5, Part 2, DD Form 351-1, Section F). Grumman's representatives also admitted

unanimously at trial that Grumman, not the Navy, designed the specifics of the longitudinal flight control system in issue here (T. 2:136, 158-68; 3:35-38, 93-95, 101-04).

To be sure, Grumman was required to submit its design data and drawings to the Navy for review and release (T. 2:167-68; 3:12-18), but the contract expressly provides (under a heading entitled "Design Responsibility") that "[i]n releasing design data or drawings to the Contractor, the Government accepts no responsibility for the successful operation of the equipment manufactured by the Contractor" (Defendant's Exhibit 5, Part 2, DD Form 351-1, Section S). The separate general military specification governing submission of design data and drawings during development of the A-6 also expressly provides that the Government does not assume responsibility for any deviation from applicable specifications, and that "[t]he responsibility for satisfactory construction and functioning of the aircraft or aircraft parts and for satisfactory stability and weight rests entirely with the contractor" (Defendant's Exhibit 1, p. 47, ¶¶4.2.2.1., 4.2.2.3.).

In short and in sum, the specifics of the A-6's longitudinal flight control system were designed solely by Grumman to meet only the most general of specifications, and the Navy's role was limited to checking the design data and drawings for completeness and compliance with the general specifications—but with a disclaimer of any responsibility for accuracy, completeness, compliance with specifications or proper functioning of the finished product. The obvious reason for this approach to the design of the aircraft was (as the trial court found in a finding of fact not challenged by Grumman below) that the Navy lacked the technical expertise to design the aircraft itself (which, as a matter of common sense, is why it contracted with

Grumman for the design of the aircraft in the first place). Clearly, although Grumman and the Navy collaborated upon the general specifications mislabeled "Detailed Specification", the actual design of the A-6's longitudinal flight control system was Grumman's design, not the Navy's. The Navy was simply one of Grumman's customers—a relatively sophisticated customer to be sure, but a customer nevertheless.

In another tortured effort to shade the facts to fit its argument, Grumman and its amici have laced their arguments with claims that the A-6 was "on the cutting edge of technology". We suppose that hyperbolic characterization might be valid with respect to some of the aircraft's electronics and weapons delivery systems, but it is a certainty that the flight control system in issue here was perfectly "conventional" in every sense of that term. The system consists simply of a connected series of pushrods and bellcranks (and assorted peripheral devices and hardware), held together by nuts and bolts, mechanically linking the cockpit's control stick to a dual hydraulic actuator and the stabilizer, located in the tail of the aircraft. Grumman's principal design engineer conceded at trial that this system had been in use for many years in both military and civil aircraft, and that it was perfectly "conventional" (T. 1:138, 152; 3:95-96). In fact, the system was touted in one of the documents placed in evidence by Grumman below not for any advance in the state of the art, but precisely because it was perfectly conventional—because it was essentially the same system successfully utilized previously in the S2F, F9F, and the F11F model airplanes (Defendant's Exhibit 2, p. 16 note (7)).

It is also untrue that, as Grumman claims, no other attack aircraft currently in use in the United States mil-

itary incorporates the type of redundant or fail-safe features which the district court found were negligently omitted from the A-6's longitudinal flight control system. In fact, all other primary and secondary flight control systems in the A-6 itself incorporated precisely the type of redundant or fail-safe features omitted from the critical control system in issue here (T. 1:167-69; 2:46-47, 99-100; 3:83-84). According to expert testimony presented below, redundancy in flight control systems has been a design "consent" in the industry ever since World War II (T. 2:23-24), and this "consent" was formalized by the military in 1973 by revising its general specifications to *require* exactly what was missing in the A-6's longitudinal flight control system (T. 2:24-27, 100-07). The head of Grumman's flight controls design group also conceded at trial that a redundant or fail-safe feature was feasible and could have been designed, and the only reasons he gave at trial for not including such features were that they were not "required", and that they were "unnecessary" because the longitudinal flight control system designed by Grumman was so reliable that "once it was put together properly, it would not fail" (T. 1:158, 165-66; 3:68-70, 123-24)—which brings us to our final point.

Grumman and its amici have applauded the general performance of the A-6 in various military theaters, and in the continuing defense of the nation. The self-congratulation is certainly deserved, and we have no quarrel with it—but the fact remains that the entire A-6 program is not on trial here. What is at issue here is the reasonableness of the design of the A-6's longitudinal flight control system—which is rendered absolutely useless by the loss of a single bolt or a single hardware failure anywhere in the lengthy mechanical system. Grumman clearly deserves no praise for that specific aspect of the A-6 pro-

gram, because the record reflects at least six instances of longitudinal flight control system disconnects or hardware failures, resulting in the total destruction of five A-6 aircraft, five fatalities, and one serious injury (four crewmembers successfully ejected) (T. 1:92-93; 2:53-63, 95; Plaintiff's Exhibits 9B, 9O-S).

All things considered, no matter how capable or reliable the A-6 may have been in other respects, its perfectly "conventional" longitudinal flight control system had a deplorable record by any standard—military, civil, lay, or otherwise. Grumman cannot properly dispute that contention, because even it recognized the seriousness of the problem by proposing a partial after-the-fact fix for it in the form of a retrofit of self-retaining bolts (T. 2:145-50). Unfortunately, the fix was insufficient to prevent the peacetime death of LTJG Gary Shaw and his bombardier/navigator, when the single series of mechanical linkages gave way in their A-6 on a night catapult shot, causing it to pitch instantly, uncontrollably and violently into the ocean.

REASONS WHY THE PETITION SHOULD BE DENIED

We cannot deny that there is an apparent disagreement among the Circuits concerning the precise nature of the elements of the so-called "military contractor defense". In our judgment, however, the conflict has been effectively resolved by this Court's recent decision in *United States v. Shearer*, 473 U.S. .. . 105 S. Ct. 3039, 87 L. Ed.2d 38 (1985), and there is therefore no need for the Court to resolve it again. At the very least, the issue deserves further exploration by the lower courts in light of *Shearer*, and there is therefore good reason for this Court to stay its hand at the present time.

The leading conflicting decision—*McKay v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984)—was decided more than two years before *Shearer*. In the two years which followed before *Shearer* was decided, *McKay* was uncritically followed by two other Circuits in *Tillett v. J. I. Case Co.*, 756 F.2d 591 (7th Cir. 1985); *Koutsoubos v. Boeing Vertol*, 755 F.2d 352 (3rd Cir.), *cert. denied*, ... U.S. ....., 106 S. Ct. 72, 88 L. Ed.2d 59 (1985); *Schoenborn v. The Boeing Co.*, 769 F.2d 115 (3rd Cir. 1985), *cert. denied*, ... U.S. ....., 106 S. Ct. 851, 88 L. Ed.2d 891 (1986).

All of these decisions rest primarily upon a perception that the "*Feres-Stencel* doctrine" is designed to prevent the Government from paying the cost of injuries sustained by its servicemen:

> The reasons for applying the government contractor defense to suppliers of military equipment with design defects approved by the government parallel those supporting the *Feres-Stencel* doctrine. First, the Supreme Court emphasized in *Stencel* that the United States cannot be directly or indirectly liable to servicemen injured by defective military products. But holding the supplier liable in government contractor cases without regard to the extent of government involvement in fixing the product's design and specifications would subvert the *Feres-Stencel* rule since military suppliers, despite the government's immunity, would pass the cost of accidents off to the United States through cost overrun provisions and equipment contracts, through reflecting the price of liability insurance in the contracts, or through higher prices in later equipment sales. . . .

McKay, supra, 704 F.2d at 449.

While we question whether this Court has ever advanced that rationale for the "*Feres-Stencel* doctrine", we need not debate that point here. We need not debate it because *Shearer* finally makes it clear that the only relevant considerations in determining whether the "*Feres-Stencel* doctrine" or the "separation of powers doctrine" is implicated are "whether the suit requires the civilian court to second-guess military decisions . . . and whether the suit might impair essential military discipline"—and that the other rationales for the doctrine which have appeared from time to time in the decisional law are "no longer controlling".[1] *Shearer, supra,* 87 L. Ed.2d at 44, 44 n.4. In short, *Shearer* rejects the primary underpinning of *McKay* and its uncritical pre-*Shearer* progeny.[2]

The instant case was decided after *Shearer* and its result is clearly influenced by the strong signal which this Court transmitted in *Shearer:*

> . . . The *McKay* court declared that "[t]he reasons for applying the government contractor defense to

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1. This announcement was an obvious response to a recent series of lower court decisions expressing puzzlement over the continued viability of all but the core rationale of *Feres,* and concluding that only the "military discipline rationale" made any sense. This development is discussed and analyzed (and the decisions collected) in *Johnson v. United States,* 749 F.2d 1530 (11th Cir. 1985), *approved on en banc reh'g,* 779 F.2d 1492 (11th Cir. 1986). It is noteworthy, we think, that *Shearer* completely vindicated the *Johnson* panel's pre-*Shearer* conclusion that only the "military discipline rationale" of *Feres* had survived the scrutiny of time, and that the en banc Court rested its approval of the panel's conclusion squarely upon this Court's intervening decision in *Shearer.*

2. It is also worth noting that even if *McKay's* misreading of *Feres* had survived *Shearer,* the "cost pass-through" rationale of *McKay* would provide no reason for a "military contractor defense" in the instant case, because the Government insisted in its contract that Grumman purchase liability insurance for the benefit of the plaintiff in this case and voluntarily paid the cost of that insurance.

suppliers of military equipment with design defects approved by the government parallel those supporting the *Feres-Stencel* doctrine," . . . Although in our view the military contract defense may be applied quite apart from *Feres*—that is to say, its separation of powers rationale is independently coherent—we accept the parallel. However, since the *Feres* doctrine has undergone a certain amount of reworking since its inception and, indeed, even since *McKay*, it is necessary to reframe the *McKay* rationales somewhat.

. . . .

. . . [E]conomically sound or not, the cost pass-through rationale is based on a strained reading of *Stencel* and an outdated interpretation of *Feres*. . . .

But in any case, the limitation of government liability rationale behind the *Feres-Stencel* doctrine appears, since a recent Supreme Court decision, to be "no longer controlling." *United States v. Shearer*, ... U.S. ....., 105 S. Ct. 3039, 3043 n.4, 87 L. Ed.2d 38 (1985). Thus, this Circuit will not recognize a military contractor defense simply to shield such contractors —and (only arguably) the government—from the cost of liability for defectively designed products.

As we noted above, there are better reasons for the defense. The factors controlling in *Feres* inquiries that do survive *Shearer* are (1) "whether the suit requires the court to second-guess military decisions," and (2) "whether the suit might impair essential military discipline." . . .

Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 741-42 (11th Cir. 1985). The remainder of the Eleventh Cir-

cuit's opinion fashions a "military contractor defense" which is sensitive to the two factors of the "*Feres-Stencel* doctrine" which survive *Shearer,* and which is not bottomed upon any of the once-perceived rationales of the doctrine which are now "no longer controlling". In view of *Shearer,* it is difficult to justify *McKay* and its progeny any longer, and hard to fault the Eleventh Circuit's post-*Shearer* fine-tuning of the "military contractor defense" in this case.

One other Circuit has decided the issue presented here after *Shearer*—in *Bynum v. FMC Corp.*, 770 F.2d 556 (5th Cir. 1985). Although Grumman and its amici have lumped *Bynum* with *McKay* and its progeny, a fair reading of *Bynum* will reveal that it is not inconsistent with the Eleventh Circuit's opinion in this case. Like the Eleventh Circuit's opinion in this case, the Fifth Circuit's opinion in *Bynum* recognizes that the "military contractor defense" must rest on a narrower foundation after *Shearer*:

> Since *Stencel,* it has become clear that the third factor described above is the principal justification for the *Feres-Stencel* doctrine. Most recently, for example, in *United States v. Shearer,* ..... U.S. ....., 105 S. Ct. 3039, / L. Ed.2d 38 (1985), the Supreme Court stated explicitly that the other factors mentioned in the *Feres* and *Stencel* decisions were "no longer controlling." . . . Rather, to the *Shearer* Court, the central questions have become "whether the suit requires the civilian court to second-guess military decisions and whether the suit might impair essential military discipline." . . .

770 F.2d at 562. The Fifth Circuit thereafter "adopt[ed] the *McKay* test"—but its adoption of the test was care-

fully qualified by addition of the phrase "at least insofar as it applies to the circumstances of the instant case". 770 F.2d at 567.

The "circumstances" in *Bynum* were far different than the circumstances in *McKay*. In *Bynum*, the *Government* designed the product in issue, and the "innocent contractor" (770 F.2d at 566) merely manufactured it according to the Government's design specifications. As a result, *McKay* was followed on the facts in *Bynum*, but the Court expressly left open the question of whether mere "approval" of a contractor's design by the Government would be sufficient to support the defense—and it opined in dictum that it would not:

> At least with respect to the circumstances of this case, we think that the *McKay* formulation of the government contractor defense . . . substantially reflects the pertinent federal interests. To establish the government contractor defense, a military contractor must first demonstrate that the government is immune from liability under the *Feres-Stencel* doctrine. . . . Second, the military contractor must prove that the government established reasonably precise specifications for the allegedly defective military equipment and that the equipment conformed to those specifications. *This element makes clear that federal law provides no defense to the military contractor* that mismanufactures military equipment or *that is itself ultimately responsible for the design defect.*[23] Finally, it must be shown that the military contractor warned the government about errors in the government specifications or dangers involved in the use of the equip-

ment that were known to the contractor but not to the government. . . .

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23. Courts and commentators disagree over the extent to which the government must participate in generating the design specifications of military equipment before the government contractor defense would be applicable. . . . *We need not address this issue.* Before the district court, both parties stipulated that the product at issue here "was manufactured in accordance with precise design specifications furnished by the United States government." . . . This certainly is enough to satisfy the requirement.

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770 F.2d at 574 (emphasis supplied). In our judgment, this reformulation of the *McKay* test (which was obviously motivated by this Court's reformulation of the "*Feres-Stencel* doctrine" in *Shearer*) is perfectly consistent with the Eleventh Circuit's opinion in this case—and both Courts would have decided the two cases in exactly the same way.

In short and in sum, the "*Feres-Stencel* doctrine" has recently been clarified by this Court in a way that renders *McKay* and its pre-*Shearer* progeny no longer defensible. The courts which have decided the issue presented here after *Shearer* have recognized this, and it is likely that courts considering the issue in the future will reach the same conclusion. *See, e.g., Johnson v. United States,* 749 F.2d 1530 (11th Cir. 1985), *approved on en banc reh'g,* 779 F.2d 1492 (11th Cir. 1986) (in which the Eleventh Circuit sitting en banc held that, in light of *Shearer,* the *Feres* doctrine no longer barred suit by a serviceman against the Government for the negligence of one of its civilian agencies).

Because the holding of the Eleventh Circuit's opinion in the instant case is directly responsive to this Court's strong signal in *Shearer,* the apparent conflict which it

has created has already been essentially resolved, and there is therefore no need for this Court to intervene to repeat what it has already made clear in *Shearer*. At the very least, the issue presented here deserves further exploration by the lower courts in light of *Shearer*, so that this Court has the benefit of a thorough analysis of the issue upon its new foundation before resolving it with finality. For both of these reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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